



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

the purpose of the statute was apparently to make Illinois conform to the general rule. The court also reasoned that the statute itself did not prohibit considering the revocation as merely presumptive, distinguishing it specifically from the English type of statute which provides that a will shall be revoked by marriage. This cannot be sustained. A statute that marriage shall be deemed a revocation is no less absolute than a statute that a will shall be revoked by marriage. *Lathrop v. Dunlop*, 4 Hun, 213; aff'd, 63 N. Y. 610. And the Illinois court had already held that the statute ended all controversy. *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397; *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172.

BOOK REVIEWS

PAPERS ON THE LEGAL HISTORY OF GOVERNMENT. By Melville M. Bigelow.
Boston: Little, Brown, and Company. pp. 256.

There are five of these papers: I, Unity in Government; II, the Family in English History; III, Mediaeval English Sovereignty; IV, the Old Jury; V, Becket and the Law. Their titles give the impression that they are separate in character; but in fact they form a single thesis illustrated historically from general political and constitutional history, and, in the last two papers, from legal history. The thesis is stated in the first paper on the Unity of Government. It is the question as to the proper limits in the sphere of government of the two contrary principles of individualism and collectivism — a question the settlement of which is vital to the stability of government and therefore to the stability of civilized society. Of the sphere of these two principles Mr. Bigelow has said much with which I am in entire agreement. We cannot do without individualism. "In itself individualism is a store house of personal energy; it is the indispensable dynamic of life; when directed to the proper end it is the chief means of doing good." On the other hand, mere unrestrained individualism is "unsafe and unsound when considered in reference to the peace and stability and welfare of the state." Some of the effects of the English policy of Free Trade, and the manner in which that policy was made a fetish in order to suit the transient needs of English party politicians, are perhaps the best illustrations in modern times of the results of unrestrained individualism. That it was inconsistent with the safety of the state was shown by the War, and by the measures passed almost too late to remedy some of its consequences. In effect it denies to the state its proper sphere. On the other hand, the principle of collectivism, which makes for the unity and solidarity of the action of the state, is apt to give the state power to move out of its proper sphere. "History tells us plainly enough that whenever collectivism, such as exists, moves forward with energy towards realizing its purposes, it is sooner or later encountered by sordid individualism with a tangled mass of troublesome influences."

What, then, is the solution? The solution indicated by Mr. Bigelow is the formation of a sound public opinion which will enable the state, without repressing individualism, to bring to bear upon it a restraining influence in the interests of the public weal — a public opinion which will enable the state to repress the evil effects of individualism without reducing the individual to the position of being merely a small cog in the mechanism of a great machine. Now one of the factors in the formation of such an opinion is religion; and one of the greatest achievements of religion, and more especially of the Christian religion, is the family. In the family, as the author points out, the two principles of collectivism and individualism have full play. The family was a "body bound together by service." "It gave to society the stamp of collectiv-

ism so far as the type remained true to itself." On the other hand, *qua* outsiders the family was an individual unit. In primitive society it was "autocrat to such an extent as to make the higher government of later times difficult." It is not therefore surprising that, in our own days, those fanatics who wish to nationalize everything should see that they must first of all get rid of, or as far as possible minimize, the importance of the family. They wish to give the state a hand in its arrangement, which will have, as it always has when the state steps outside its proper sphere, a paralyzing effect. In civilized states their suggestions will take the form of proposals to endow the family; and in savage states like Russia of proposals to nationalize women. Both sets of proposals really rest on very similar exaggerations of the sphere of the state — of the principle of collectivism. As Mr. Bigelow points out, it is this combination of collectivism and individualism in the family which makes it so effective a moral agency. The state can never take its place. It can encourage it; it can suppress excesses of the individualistic spirit which are antagonistic to it; but it can do little more. If it ever disappears, with it will disappear the most effective agency for the promotion of the virtues essential to the well-being of the state, and for the maintenance of a sound public opinion.

So far I am in agreement with the general principles stated by Mr. Bigelow. It is when he tries to illustrate or prove them by instances drawn from the very remote history of our race that I cannot assent to his views. He appears to think that our Germanic ancestors, as described by Caesar and Tacitus, afford an illustration of a type of polity which contained the right blend of the principles of collectivism and individualism; that the family life of the old Germans was the central feature of their polity; and that this family life lived on throughout the Middle Ages mainly in the lower ranks of society. His view seems to be that the sovereignty of the state, as enforced by Henry II, was an encroachment on the free individualism of the family which sapped its strength; and that, if Becket had had his way, the people would have given their free consent to Henry's policy, with the result that that policy would have been liberalized, and therefore improved. It would have been the collective policy of the nation, not the individual policy of Henry. He thinks, for instance, that in the domain of legal history there would have been no need for the separation between law and equity; and that in the law of criminal procedure and evidence another and a better system, which did without a jury, would have been possible.

To my mind, if I may say so with respect, Mr. Bigelow's reading, both of general political and constitutional history and of legal history, is so original as to be almost fantastic. The teachings of history, if they are to carry weight, must be based on verified facts; and they must deal with problems and conditions which are comparable to the problems and conditions of our own times. We cannot treat the events of English history as some theologians treat the events of Old Testament history, and interpret them in a particular way for the purpose of drawing a particular moral. But it seems to me that the account given of and the moral drawn from the polity of the old Germans described by Caesar and Tacitus fail to carry conviction, partly because there is much in our author's account of the sphere of the family and its relation to the tribal state in the old Germanic law which is very conjectural, and partly because the state of society there depicted is so remote from that of the modern state that it is difficult to derive very much instruction therefrom. These old Germans were, after all, very savage; and it is doubtful whether modern society could have found much use either for their virtues or their vices. A Bolshevik state might indeed make some use of their more ignorant members in a Red army; and perhaps the more enlightened among them might be useful members of a Labor party; for they would certainly have been in opposition to any

modern government; they would have been slaves to formulae, and they would have been incapable of taking any but the shortest views based on what seemed to make for their momentary physical advantage. Some of us have read the adventures of "A Yankee at the Court of King Arthur"; we may conjecture that the stay of an old German Tribesman at the White House or any other civilized house would have been very short. To suppose that a stable state could have been founded on the "voluntary self-discipline" of these men, without the growth of the modern conception of the sovereignty of the state, does not seem to me to be a tenable thesis. Similarly, to suppose that in later times the strength of family feeling, in the form in which it makes for the stability of the modern state, is identical with the form which it took amongst the old Germanic tribes; and to suppose that it survived in later ages, when the state had acquired more strength, mainly or solely in the lower classes of society — seem to me to be merely wild imaginings.

And these theories are clearly responsible for Mr. Bigelow's very peculiar views as to the effects of Henry II's reforms on the future course of English history, as to the rights and wrongs of his controversy with Becket, and as to one or two episodes in English legal history which he has used to illustrate these views. He says that "Henry had reached the great idea of Sovereignty"; and there is little doubt but that he had gone as far towards reaching it as a mediaeval king could go. But when he goes on to assert that Henry thought of the state "as a personal thing," "as a narrow entity independent of the mass of men composing it," and that such a government had not the stability of "Old German government — single government of self-disciplined men," he seems to me to have seriously misread history. Surely it was the work of Henry II in founding a common law which made possible the growth of that sound collective feeling for the common law which, right down the ages, has been the main factor in securing for England constitutional government, and in preserving for the world one example of the successful working of such a government. Much of the collective opinion of Henry II's day would have been hostile to his reforms; and if history teaches anything, it seems to me that it teaches this, — that a sound collective opinion in the nation at large is the product of the teaching of a sovereign state, the powers of which have been used justly, because they have been entrusted to its more competent and saner members. Then, too, because Mr. Bigelow unduly depreciates the effects of Henry's reforms, it seems to me that he unduly appreciates the ideals of Becket. He regards Becket as the exponent of the collective ideals of the people as against Henry's attempts to impose upon them the sovereignty of the state. "The new primate," he says, "had behind him as no other ever had the body of the people; now, not to be exploited as they had been, and as the king was willing to have them still, but to be forwarded in a way, as Becket clearly saw it, to give the needful help, the popular help for the monarchy; in a word, to relieve the lower classes, so sore depressed, ultimately of disabilities, in accordance with the teaching of Christianity — to find the serf and leave him man." But I think that what Becket had at heart was far more the interests of the church than the interests of the people; and it is certain that his claims, if realized, would, by preventing the common law from becoming "the sovereign law of king and people," have retarded the development of the nascent English state. Let us remember that the one point in which his ideas partially prevailed gave rise to that monstrous anomaly the Benefit of Clergy.

It is this hero worship of Becket and his supposed ideals which has, it seems to me, inspired Mr. Bigelow with some erroneous ideas as to the effects of certain developments in our English legal history. He considers (and perhaps with reason) that the English development of the jury system had a very unfortunate effect on the development of the law of evidence, and that it was

not until the rise of the Court of Chancery that the absence of a law of evidence was supplied, and then inadequately. He considers that this and other defects of English law would have been remedied if, under the leadership of Becket, a further and larger reception of Roman law, canon and civil, had taken place. In particular there would have been no divorce between law and equity — “the Judicature Acts took a long step in the right way, but they should have been unnecessary. The step should have been taken in the reign of Henry Plantagenet. Thomas of Canterbury had the mind and the courage to take it, but an untimely issue of jurisdiction turned him away and slew him.”

But if there had been a further reception of Roman and canon law, if the jury system had gone down before it, the experience of continental nations makes it quite clear that the inquisitory system of the canon law would have been introduced into our system of criminal procedure. Mr. Bigelow doubts whether this would necessarily have been the case; but it is difficult to see how England could have escaped the inquisitory procedure which the other states of western Europe sooner or later adopted. Like those other states, England would have had no alternative. To have avoided that result is worth a great deal more than a slow or even a distorted development of a law of evidence. Moreover, if English law had become more Romanized, it is difficult to see how our independent common law could have grown up on native lines, and become the one great rival of the Roman system. If this had not happened, the jurisprudence of the world would have been infinitely the poorer, and not only the jurisprudence of the world. When, in the sixteenth century, the tide was setting strong for absolutism, it was the constitutional ideas which had been drilled into Englishmen by the common law, it was the English Parliament which alone among mediaeval representative assemblies had been made an efficient organ of government by the common lawyers, which saved for England and the world the mediaeval ideal of the rule of law, and preserved the pattern of a constitutional state. Could these results have been achieved if English law had been thoroughly Romanized in the twelfth century?

It is for these reasons that I think that, though Mr. Bigelow's theories have much to commend them, they are hardly advanced by historical arguments which are based upon readings of history, which are, to say the least, highly disputable; and by deductions drawn from them which are perhaps even more disputable. In the sphere of legal history these deductions seem to me to have been productive of serious error; for they have led Mr. Bigelow to condemn the results of certain developments in English legal history without a sufficient consideration of what seem to me to be decisive reasons for thinking that these developments have been productive of infinitely more good than harm. I think that if Mr. Bigelow had cared to glance at the Tudor period, he would have found that some aspects of the English polity during that period show a more serious and a more considered attempt to adjust impartially the claims of collectivism and individualism than has been shown at any period before or since. Lessons drawn from that or from some later period would have been more valuable, both because the facts are better ascertained and because the problems then confronting the state were necessarily more akin to the problems which confront us to-day.

W. S. HOLDSWORTH.

UNIFORM STATE LAWS IN THE UNITED STATES, Fully Annotated. By Charles Thaddeus Terry. New York: Baker, Voorhis & Co. 1920. pp. 688.

This unpretentious volume calls attention to the collected work of the Commissioners on Uniform State Laws. The laws hitherto recommended by them, twenty-three in number, are here reprinted and indexed, and annotated with the decisions of the courts up to the time of the issue of the book.